Supreme Court of the United States

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October Term, 1974
No. 74-562

ARTIE MAHALEY, *et al.*,
Petitioners,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents.

and

CITY OF EUCLID, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT CITIES, EUCLID, GARFIELD HEIGHTS, SOLON AND WESTLAKE IN OPPOSITION

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OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 500 F.2d 1087, and is contained in petitioner's appendix at page A1.

The opinion of the three-judge District Court is reported at 355 F. Supp. 1245 (N.D.Ohio 1973) and is contained in petitioner's appendix at page A34.

The opinion and order of the single-judge District Court is reported at 355 F. Supp. 1257 (N.D.Ohio 1973), and is contained in petitioner's appendix at page A58.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1974 (A1, A32). A petition for rehearing was denied on August 14, 1974 (A33). The petition for writ of certiorari was filed November 8, 1974. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May the individuals comprising the governing bodies of five municipalities situated throughout the greater Cleveland area be found guilty of effecting an unconstitutional discrimination based on wealth or race because of their failure to enter into a public housing program when they were never given an opportunity to pass upon the matter?
2. Did the Court of Appeals correctly determine its own jurisdiction in finding that the District Court's decision under appeal was a final order within the meaning 28 U.S.C. §1291?

STATUTE INVOLVED

42 United States Code §1415(7): Local Responsibilities and Determinations.

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which

become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter; (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that a gap of at least 20 percentum (except in the case of a displaced family or an elderly family) has been left between the upper rental limits for admission to the proposed low-rent housing and the lowest rents at which private enterprise unaided by public subsidy is providing (through new construction and available existing structures) a substantial supply of decent, safe, and sanitary housing toward meeting the need of an adequate volume thereof.

STATEMENT OF THE CASE

This action was commenced on March 15, 1971, by the filing of a Complaint in the United States District

Court for the Northern District of Ohio, Eastern Division, on behalf of three individual plaintiffs, all Cleveland residents, two of whom are black and one is white. These individuals claimed to be eligible for public housing. Also, as party plaintiff is a nonprofit Ohio corporation, the PATH Association, whose stated purpose is to: "Increase the supply of decent housing in the greater Cleveland, Ohio area, and to make that housing available to all persons irrespective of race, class or religious persuasion."

As defendants, the plaintiffs selected at random five of the 56 municipal corporations located in Cuyahoga County, Ohio (the greater Cleveland area). Also made parties defendant were their mayors and councilmen in office at the time of the filing of the Complaint, individually and in their official capacities; the Cuyahoga Metropolitan Housing Authority (CMHA), a public housing agency, its Board and Executive Director, and the Department of Housing and Urban Development of the United States (HUD) and its Secretary, George Romney.

The action was brought as a class action with the plaintiffs allegedly representing all low income residents of the greater Cleveland, Ohio area, who by virtue of their poverty, or race, or both, were unable to secure decent and sanitary housing at rents which they could afford without the assistance of the defendant CMHA. None of the three named individual plaintiffs reside in any of the five defendant municipalities. One of the individual plaintiffs, Mahaley, resides in a CMHA project in Cleveland.

At issue in this case are certain controversies over low-rent public housing under the United States Housing Act of 1937, as amended, 42 U.S.C. §1401, et seq. Under this Federal Act, before federal funds will be made available to public housing agencies for the construction and

operation of low rent public housing within a municipality, there must be a local determination of need and "the governing body of the locality involved. . . [must have] entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter. . . ." 42 U.S.C. §1415(7)(A)(1)(2) and (B) (1).

The evidence showed that none of the plaintiffs or any member of their class, or CMHA ever appeared before any of the five municipal councils, nor has there ever been a request to enter into a cooperation agreement directed to any of the five defendant councils. Further, at trial the former Chairman of the CMHA Board, who served for 27 consecutive years until 1970, testified that he had never sent a letter to any of the governing bodies of the defendant municipalities relative to a cooperation agreement. It did appear that, prior to the filing of the Complaint, one mimeographed letter was mailed by the Executive Secretary of CMHA to all mayors, city managers or other chief executives of the municipalities throughout Cuyahoga County. This letter was of an informational nature only regarding different aspects of public housing. This letter did not request that a cooperation agreement be entered into and there was no personal contact or follow up with the mayors by CMHA.

The "Cooperation Agreement" required by Section 1415(7)(B)(1) is a contract between the local housing authority and the individual municipality. The municipality must be authorized to enter into this contract through a vote of its local governing body, the Council. Among the obligations undertaken by the municipality in this contract is the obligation to hold the public housing project exempt from all real and personal property taxes. The municipality further agrees that within five years after the comple-

tion of the project it will undertake to eliminate by demolition, condemnation, effective closing or compulsory repair or improvement a number of unsafe and unsanitary dwelling units equal to the number of units in the low rent public housing project. There was no proof offered at trial that in any of the defendant municipalities there were any slums or unsafe or unsanitary dwelling units for which this provision would be effective.

In the Cooperation Agreement, the municipality further binds itself to furnish to the public housing project public services and facilities of the same character and to the same extent as are furnished to other dwellings and inhabitants of the municipality. The municipality agrees to vacate such streets, roads and alleys within the area of the project as may be necessary and proper to the development thereof, and to convey without charge to the housing authority such interest as the municipality may have in such vacated areas. Further, the municipality agrees to remove from the vacated areas all public or private utility lines and equipment without cost or expense to the housing authority and further agrees (to the extent it may lawfully and properly do so) to grant deviations from its zoning and building codes to promote economy and efficiency in the development and administration of the project. In lieu of payment of its taxes, the housing authority pays 10% of the "shelter rent" generated by the project, basically gross rent minus utilities, to the County Auditor for distribution in the same manner that real and personal property taxes would be distributed if the project were not tax exempt. Although this 10% payment in lieu of taxes does generate some revenue to the municipality the evidence indicated that the payment is a small fraction of the real and personal property taxes that would be generated by like projects which were not tax exempt.

At trial, there was no evidence introduced to show that any one of the five defendant municipalities had significant housing problems. There was no showing that there were any slums or sub-standard housing units within the five municipalities. There was no showing that any present resident of CMHA housing came from any one of the five defendant municipalities or that any resident of the defendant municipalities was presently on the waiting list for CMHA housing. While there was some evidence introduced to show that residents of each of the municipalities qualified for welfare payments which, in turn, would qualify them for CMHA housing on the basis of income alone, there was no showing that any of these persons had housing problems, required public housing or even desired or requested public housing in their municipality.

REASONS FOR DENYING CERTIORARI

I. THERE HAS BEEN NO DENIAL OF EQUAL PROTECTION TO THE PLAINTIFF CLASS.

Under the facts of the present case, the governing bodies of the five defendant municipalities never made a decision concerning whether to enter into a cooperation agreement, and thus, took no "action" which would deny a protected class the equal protection of the laws. Further, even assuming that inaction when there is a duty to act is sufficient to satisfy the "state action" requirements of 42 U.S.C. §1983, the mere fact that the councils have not entered into a cooperation agreement, as they are authorized to do under the United States Housing Act, simply does not prove the violation of anyone's constitutional rights.

The Court of Appeals correctly followed this Court's holding in *James v. Valtierra*, 402 U.S. 137 (1971)[1] where this Court stated:

> "By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local government accept this or to outlaw local referendum on whether the aid should be accepted.
>
> . . .
>
> "The people of California have also decided by their own vote to require referendum approval of low-rent public housing units. This procedure insures that all the people of the community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'" 402 U.S. at 140, 142-143.

The evidence in the *Valtierra* case and the instant case are essentially identical. In both cases there was a waiting list for low-rent public housing.[2] In both cases,

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1. At the time the instant Complaint was filed on March 15, 1971, the District Court's opinion in *James v. Valtierra* was still in force. 313 F. Supp. 1 (N.D.Cal. 1970) (three-judge court). The allegations of the Complaint in the instant case closely parallel the findings of the District Court in *Valtierra*. Subsequently, on April 26, 1971, this Court reversed the District Court in *James v. Valtierra*, 402 U.S. 137 (1971).

2. In *Valtierra* the waiting list was comprised, in part, from residents of the jurisdictions where the referendums were conducted. In our case, however, the list is comprised of residents of municipalities other than the defendant municipalities.

the majority, but by no means all, of the applicants for low-rent public housing were from minority groups. In both cases, there was no showing of purposeful discrimination by any local official. In both cases it was shown that public low-rent housing projects are financed through bonds issued by the local authority, and that the local governmental body must agree to provide all municipal services for the units and to waive all taxes on the property. In both cases, the plaintiffs' argument was similar; namely, the "special burden" of local government approval works an unconstitutional discriminatory effect either based on race or poverty on those who have applied for low rent public housing. This Court answered that argument as follows:

> "But of course a law making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision for a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." 402 U.S. at 142.

Simply stated, assuming that the five municipal councils' "inaction" had a basis of classifying into two groups. there was no showing that the inaction was based upon an "inherently suspect" classification such as race, alienage or national origin, or that the municipal councils' inaction impinged upon a "fundamental interest" such as the right to vote or the right to appeal a criminal conviction or the right to interstate travel that would subject the municipal councils' inaction to "strict" or "close judicial scru-

tiny". In fact, this Court has held in *Lindsey v. Normet*, 405 U.S. 56, 74 (1972):

> "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or recognition of any right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative not judicial functions."

Racial discrimination was not proved in this case, and under the more relaxed "rational relationship" test, it is not a violation of the Equal Protection Clause of the 14th Amendment for the individual members of a municipal governing body not to seek out and enter into a cooperation agreement with a local public housing authority when it was shown that the individuals were never requested to enter into the cooperation agreement; when it was shown that the municipality would be required to undertake substantial financial obligations pursuant to the cooperation agreement; when it was shown that the persons in need of the public housing resided in another municipality; and when the federal statute creating the public housing program specifically gave the local municipality the sole right to determine its need and desire to enter into the program. *James v. Valtierra, supra; Lindsey v. Normet, supra; San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Palmer v.*

Thompson, 403 U.S. 217 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961).

All of the cases on which the petitioners rely involve either the refusal of a governmental body to grant benefits equally to all or conscious governmental obstruction of specific private projects beneficial to minority groups or to integration within their own jurisdiction. See, e.g., *United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (City refusal to extend water and sewer service to low income housing project although it had extended service to other developments); *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973) (City refused to issue building permit for low income housing project and restricted such projects to segregated neighborhoods); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (per curiam) (County officials refused to issue building permits for low income housing project); *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971); (City effectively restricted low income housing project to segregated neighborhoods); *Kennedy Park Homes Association v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (City regional parcel to prevent construction of low income housing project); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (City denied building permit and zoning change to low-income housing project)

In contrast to the foregoing cases, the petitioners here seek not to remove governmental obstacles to a specific proposed housing project but rather to impose upon the respondents that affirmative duty to undertake a social and economic program to construct housing of a particular

nature for particular persons regardless of the municipal priorities. This is clearly not required by the Equal Protection Clause of the 14th Amendment to the United States Constitution and is contrary to what was intended by Congress in the Housing Act of 1937 as amended. *Lindsey v. Normet, supra; Palmer v. Thompson, supra; Acevedo v. Nassau County,* 500 F.2d 1078, 1081 (2d Cir. July 2, 1974); *Ybarra v. Town of Los Altos Hills,* 370 F. Supp. 742 (N.D. Cal. 1973), *affirmed* ..... F.2d ....., slip op. no. 73-2070 (9th Cir. Sept. 6, 1974); *Citizens Committee for Faraday Wood v. Lindsay,* 362 F. Supp. 651 (S.D. N.Y. 1973), appeal docketed no. 73-2590 (2d Cir. Oct. 2, 1973).

II. THE LOW-RENT PUBLIC HOUSING PROGRAM IS A LOCAL OPTION PROGRAM AND THE PEOPLE OF OHIO, THROUGH THEIR CONSTITUTION, HAVE DELEGATED TO THE MUNICIPAL GOVERNING BODIES THE SOLE AUTHORITY TO DETERMINE WHETHER TO ENTER INTO THE PROGRAM.

As the Federal Low-Rent Housing Program was envisioned, the initial determination of whether the private housing market had failed, whether there were significant slums or areas of blight which needed to be eliminated, or whether the local governmental unit desired to bear the expense of participation in the program would be placed in the hands of the governing body of the various localities. Thus, the program is totally a "local option" program. The local public housing authorities were created to administer and operate the project and the federal government plays the role of a "silent partner", providing financial assistance in the form of annual contributions or annual contracts for loans, and furnishing technical aid and advice. 42 U.S.C. §1415(7)(B). As was stated in Senate Report 84, February 25, 1949, to accompany S. 1070, 2 U.S. Cong. Service 1550, at 1552 and 1556 (81st Cong. 1st Sess. 1949):

"The Bill [S. 1070] * * * is based upon the firm foundation that, although the housing problem is obviously national in scope, it is fundamentally a local problem and that the responsibility for its solution therefore rests with the local community. This bill leaves that primary responsibility with the local communities where it belongs. It recognizes that the need for any kind of housing action should be determined locally * * * It therefore provides that Federal assistance for low-rent public housing shall be available only for projects where there has been a local determination, by the governing body of the community, that such housing is required in order to meet needs not being adequately met in that community by private enterprise, and where such projects are locally initiated, locally developed and locally managed * * * With this clear understanding this bill then gives full recognition to the fact that there are many ways that the Federal Government can and should render assistance to such local communities as they themselves determine and that they need and want that assistance in order to help them meet the housing problems effectively * * *

The prime responsibility for the provision of low-rent housing is in the hands of the various localities."

The people of Ohio through their Constitution, Article XVIII, Section 3, have delegated all powers of local self-government to the governing body of their municipalities. It is the local governing bodies, in this case, the councilmen, who are the elected representatives of the people and who determine the priorities for municipal development, municipal taxation, and the provision of municipal services to their residents. Further, in Ohio, the decision of whether to permit a municipality to enter into a federal

local option program rests with the municipal council. *State ex rel. Ellis v. Sherrill,* 136 Ohio St. 328, 25 N.E.2d 844 (1940); *State ex rel. Bruestle v. Rich,* 159 Ohio St. 13, 110 N.E.2d 778 (1953); *Grisanti v. City of Cleveland,* 18 Ohio Op. 2d 143, 179 N.E.2d 798 (Cuyahoga Co. C.P. 1961), *aff'd,* 81 Ohio Law Abs. 1, 81 N.E.2d 299 (Cuyahoga Co. Ct. App.), *app. dism.,* 173 Ohio St. 386, *app. dism.,* 371 U.S. 68 (1962). A strong presumption of validity attaches to the governing body's determination. As was stated in *State ex rel. Gordon v. Rhodes,* 156 Ohio St. 81, 100 N.E.2d 225 (1951):

> "The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the court, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable." 156 Ohio St. at 81.

In the instant case there was not a scintilla of evidence that any representative of CMHA or of the plaintiffs ever requested an appearance or appeared before the City Council of any of the defendant municipalities to request that they or any of them approve a low-rent housing project or that they enter into a cooperation agreement. The Court of Appeals was factually correct when it stated:

> "The governing bodies of the five municipal defendants were never given an opportunity to pass upon the matter; nevertheless, they were charged with discrimination against blacks for failure to take affirmative action." 500 F.2d at 1094 (A14) (footnote omitted).

We submit that the instant case presents the same issue to this Court that was presented and resolved by it only last July in *Milliken v. Bradley,* ..... U.S. .....,

41 L. Ed. 2d 1069 (July 25, 1974). The following language from *Milliken* is equally applicable to the instant case:

> "But it is obvious from the scope of the inner-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of the schools through their elected representatives." ..... U.S. at ....., 41 L. Ed. 2d at 1090-91.

We submit that the Court of Appeals was correct in finding that the District Court lacked authority or jurisdiction over the local councilmen under the facts presented herein to consider whether to affirmatively order them to embark upon a social or economic program under the guise of interpretation of the Equal Protection Clause. See *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Mayor of Philadelphia v. Educational Equality League*, ... U.S. ....., 39 L. Ed. 2d 630 (March 25, 1974).

III. THE ORDER APPEALED FROM IS A FINAL ORDER WITHIN THE MEANING OF 28 U.S.C. §1291.

The trial court's decision was appealed to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. §1291 which provides that federal Courts of Appeal have jurisdiction of appeals from "all final decisions of the district courts." Both the plaintiff-appellees, Artie Mahaley, et al., and the defendants-appellees, CMHA, et al., filed motions to dismiss the appeal on the grounds that the Court of Appeals

lacked jurisdiction. By separate order of December 3, 1973, the Court of Appeals determined that it had jurisdiction, relying upon *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), and, accordingly, overruled the motions to dismiss. At oral argument on February 13, 1974, the issue of the Court of Appeals' jurisdiction was again raised. Accordingly, the Court reexamined its jurisdiction and again found that it had jurisdiction to review the trial court's decision pursuant to 28 U.S.C. §1291. See Court of Appeals' Opinion at footnote 3, 500 F.2d at 1090 (A7). It is our opinion that the Court of Appeals correctly determined its own jurisdiction.

This Court has been inclined to follow a "pragmatic approach" to the question of finality. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). It has stated that a decision, within the meaning of Section 1291, "does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. at 152. See also *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). More recently, in dictum, this Court has indicated that in certain classes of cases, such as school desegregation cases, where complex issues are involved and continuing trial court involvement may be envisioned, "many final orders may issue in the course of litigation." *Bradley v. Richmond School Board*, ... U.S. ....., 40 L. Ed. 2d 476, at 495 (May 15, 1974). The entry of any order that determined substantial rights of the parties may be appealed pursuant to §1291. *Gillespie, supra;* See C. WRIGHT, FEDERAL COURTS, §101 (2d Ed. 1970).

The Court of Appeals in footnote 3 of its decision, 500 F.2d at 1090 (A7-A9) indicates that the District Court's opinion possesses four attributes of finality; namely (1) that the District Court had determined which legal test to apply to judge the defendants' actions; (2) that in

applying this legal test the District Court had found a violation of 42 U.S.C. 1983; (3) that the defendants would be placed at great inconvenience and cost to participate in further superfluous proceedings before the District Court with the result a foregone conclusion, and (4) that precedent from this Court compelled a finding of finality.

In short, the District Court's opinion determined substantially all of the rights of the parties and was properly appealable under §1291.

CONCLUSION

Respondents believe that the Court of Appeals was bound by this Court's holding in *James v. Valtierra*, 402 U.S. 137 (1971), as the Court of Appeals acknowledged. Since the Court of Appeals followed the controlling precedent of this Court, we would submit that there are no other issues of significance which would merit the review of this Court. Because the individuals comprising the governing bodies of the defendant municipalities were never given an opportunity to pass upon whether to permit their municipalities, to enter into the local option, low-rent public housing program, the Court of Appeals was correct in finding that all the issues passed upon by the three-judge District Court bound the single-judge District Court to find for the defendants. Even further, the Court of Appeals was correct in determining under the facts presented herein that a district court did not have jurisdiction over individual council members to consider whether to affirmatively order them to embark upon a social or economic program under the guise of interpretation of the Equal Protection Clause. Lastly, the Court of Appeals was correct in ruling that the District Court had deter-

mined substantially all of the rights of the parties and that its decision was a properly appealable final order.

For all the foregoing reasons, respondents repsectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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